



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW NO. 20 OF 2014**

**REPUBLIC.....APPLICANT**

**VERSUS**

**SUSAN KIHKA.....1ST RESPONDENT**

**SAMUEL WAITHUKI NJANE.....2ND RESPONDENT**

**PAUL KIBET CHEBOR.....3RD RESPONDENT**

***EX PARTE***

**GEORGE MWAURA NJENGA.....SUBJECT**

**RULING**

By a Notice of Motion dated 7th July, 2014 the subject **GEORGE MWAURA NJENGA** seeks an order of Certiorari to quash the decision of the respondents acting as members of the Jubilee Coalition County Assembly group to remove him as the leader of majority at the County Assembly and an order of mandamus to compel the 2nd respondent to vacate the office of the leader of majority at the Nakuru County Assembly which he occupied on the basis of the impugned decision.

The subject also seeks to compel the respondents to produce, at the time of hearing of the application, such minutes, proceedings and resolution of the meeting held on 30/6/2014 or any other day prior or subsequent thereto, which was the basis of his removal as the leader of majority at the Nakuru County Assembly, failing which the court should make an adverse inference against them to the effect that the said meetings were made in breach of the rules of natural justice and against his legitimate expectation.

Aggrieved by the application the respondents filed the notice of Preliminary Objection dated 21/7/2014 seeking to strike it out on the grounds that this court lacks jurisdiction to entertain the suit (read the application); that it offends the mandatory provisions of the law to wit, **Section 39, 40 and 41** of the **Political Parties Act No.11 of 2011**, **Section 8 & 9** of the **Law Reform Act, Cap 26, Laws of Kenya**; **Order 53** of the **Civil Procedure Rules 2010** and **Article 159(2)(c)** of the **Constitution of Kenya, 2010** and that the prayers sought (Certiorari and Mandamus) are untenable in law.

When the matter came up for hearing on 27/10/2014 directions were issued to the effect that the Preliminary Objection be argued first.

In arguing the Preliminary Objection counsel for the respondents, Prof. Ojienda, submitted that when a party raises objection on jurisdiction, courts determine that issue by looking at the pleadings only. In that regard, he submitted that the Notice of Motion dated 7/7/2014, the Statutory Statement of the same date and filed on 8/7/2014 questions the manner in which the members of the coalition removed the subject from the position of the leader of the majority and replaced him with the 2nd respondent (Samuel Waithuki Njane). He contended that the dispute herein involved the manner of and election of a member of a political party in a county assembly.

Counsel submitted that Section 39 as read with **Section 40** of the **Political Parties Act** (hereinafter referred to as “the Act”) places the dispute under the mandate of the Political Parties Dispute Tribunal established under Section 39 of the Act. He maintained that the question of election and removal of the leader of majority in a county assembly is a political process and reiterated the contention that this court could not do what it is being asked to do. In this regard, Counsel referred to the case of **Orie Rogo Manduli V. Catherine Mukite Nobwola & 3 others**, (2013)e KLR where this court held:-

**“It is trite law that where the Constitution or statute provides for alternative dispute resolution mechanisms these must in the first instance be fully exhausted before the aggrieved party moves to the High Court.”**

In reply, counsel for the subject, Mr. Githui referred to the power donated to the High Court under **Article 165** of the **Constitution of Kenya**, 2010 to argue that when a provision in a statute is in conflict with a provision in the Constitution the provision in the statute is null and void (that is to say the provision in the Constitution prevails).

Referring to the cases of **Sistemi Intergrati V. Public Procurement Administrative Review Board & Another**, Nairobi High Court Misc Civil Application No. 1260 of 2007 and to **Section 8** of the **Law Reform Act, Cap 26 Laws of Kenya**, Mr. Githui submitted that the Political Parties Act does not oust this court's jurisdiction to hear and determine the dispute herein.

In **Sistemi Intergrati vs. Public Procurement Administrative Review Board & Another** (*supra*) J.G. Nyamu J., (as he then was) stated:-

**“In the case of Kenya there is no such thing as Parliamentary Supremacy and every legislation is subject to the Constitution. The courts are the guardians of the Constitution. There cannot therefore be any allegation of the courts disobedience of Parliament. Where Parliament itself, purports to restrict or curtail the powers allocated to the court by the constitution the court must promptly intervene. Constitutional power once allocated cannot be shifted by either the legislature or the executive under the banner of policy.....It is however important for this court to highlight the fact that it is not itself omnipotent. It has its limits whose origin is the principle of maintaining Constitutional balance. It is itself a creature of the Constitution, and therefore subject to the constitution and therefore its jurisdiction can also be limited by the Constitution.”**

Concerning the contention that the dispute ought to have been referred to the Political Parties Dispute Tribunal established under **Section 39** of the **Political Parties Act, 2012**, Mr. Githui submitted that its only the High Court that can issue the orders sought in the impugned application. In that regard, he referred to **Section 8** of the **Law Reform Act, Cap 26, Laws of Kenya** which provides:

**“8. (1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.**

**(2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, (1 and 2, Geo.6, c.63) of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make like order.”**

Mr. Githui submitted that the foregoing provisions of the law giving the High Court power to grant the orders sought ought to be interpreted broadly and those trying to limit those powers strictly.

In a rejoinder, counsel for the respondents reiterated the contention that this court lacks jurisdiction to entertain the dispute herein. Explaining that the **Political Parties Act** is a derivative of **Article 92(a)** of the **Constitution**, he submitted that **Section 40** thereof which provides a mechanism for dispute resolution between political parties and their members and between the members of the political parties.

### **The legal position concerning the remedy sought in the impugned application:-**

The remedy of judicial review is concerned not with private rights or merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. (see **Republic V. Secretary of State for Education and Science** *ex parte Avon County Council* (1991) 1 ALL ER 282 at 285). The point was more succinctly made in English case of **Chief Constable of North Wales Police V. Evan** (1982) 1 W.L.R. 1155, by Lord Hailsham of St. Marylebone, thus:-

**“The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court.”**

Thus, a decision of an inferior court or public authority may be quashed (by an order of certiorari made on application for judicial review) where the court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record or the decision is unreasonable in the Wednesbury sense.

In Kenya the power to grant judicial review orders is vested in the High Court. See **Article 22 (3) (f)** of the **Constitution of Kenya 2010** as read with **Section 8 (1) and (2)** of the **Law Reform Act** (*supra*). Also see **Order 53** of the **Civil Procedure Rules** which provides the procedure to be followed in lodging an application for judicial review.

### **ISSUES FOR DETERMINATION**

From the foregoing exposition of the law concerning the remedy of judicial review and the submissions by both counsels for the respective parties in the dispute herein, the issues for determination are:-

Whether the notice of preliminary objection herein meets the legal threshold required? If yes,

Whether the provisions of **Section 39** as read with **Section 40** of the **Political Parties Act, 2011** ousts the jurisdiction of this court to hear and determine the dispute herein? And/or

Whether the Political Parties Dispute Tribunal has Power to issue the orders sought in the impugned application?

Whether a decision, is a decision of an inferior court or public authority, so as to bring it in the purview of Judicial review?

What orders should the court make?

### **ANALYSIS**

With regard to the first issue, counsel for the respondents maintains that the issues raised in the respondents' notice of preliminary objection satisfies the definition of a preliminary objection espoused in **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd** (1969) E.A 696. In that case Law J.A (as he then was) observed:-

**“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

In this regard, it is pointed out that the objections in the Preliminary Objection herein relate to the issue of the jurisdiction of this court to hear and determine this matter in the light of the **Political Parties Act, No. 11 of 2011**.

Having read and considered the provisions of the Political Parties Act on which the Preliminary Objection is premised and having perused the pleadings alongside, I am satisfied that the issue raised in the notice of preliminary objection herein qualifies and meets the threshold of a Preliminary Objection and that the issue raised on jurisdiction as a preliminary point, may dispose of the suit.

With regard to the 2nd issue, **Section 39** of the **Political Parties Act, 2011** establishes the the **Political Parties Disputes Tribunal**. **Section 40**, on the other hand, gives the jurisdiction of the Tribunal, which is to determine:-

- “40(1). (a) disputes between the members of a political party;**
- (b) disputes between a member of a political party and a political party;**
- (c) disputes between political parties;**
- (d) disputes between an independent candidate and a political party;**
- (e) disputes between coalition partners; and**
- (f) appeals from decisions of the Registrar under the Act.”**

**Sub section (2)** thereof provides:-

**“Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a) (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.”**

Under **Section 41** thereof, the Tribunal is obligated to determine any dispute before it expeditiously, and in any case, within a period not exceeding three months from the date the dispute is lodged.

Under **Sub-section (2)** of **Section 40**, an Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court.

In a nutshell, the foregoing constitutes the procedure anticipated in law for dealing with political disputes.

It is not in dispute that the dispute herein is political, as it relates to a member of a political party and the decision of the members of the political party to remove the subject from the position as the leader of majority of the Jubilee Coalition in the Nakuru County Assembly and replace him with the 2nd respondent.

The subject claims that the members of his political parties did not use the procedure contemplated in law in removing him from the position of the leader of majority in the Nakuru County Assembly as they did not provide him with the reasons for his removal. They also failed to give him an opportunity to defend himself on the charges leveled against him. For those reasons, the subject contends that his removal was against his legitimate expectation that he should not be removed from the position of the leader of majority at the County Assembly without being notified of the reasons for his removal and being given an

opportunity to defend himself.

As the alleged breach of the rules of natural justice and breach of his expectation that he could not be removed from the position without being given an opportunity to be heard, this thus entitles him to bring an application for judicial review, to quash the decision, a power which any Tribunal does not have, the subject therefore decided to move this Court for the orders cited herein.

In determining this question I begin by acknowledging that whereas the Tribunal has power to hear and determine disputes like the one herein, it does not have the power to issue the orders sought in the subject's application. I say so, because under the provisions of the law cited herein above (**Article 22 (3)** of the Constitution as read with **Section 8(1)(2)** of the **Law Reform Act, Order 53 of the Civil Procedure Rules**) only the High Court has Power to issue the orders sought in the subject's application.

The foregoing notwithstanding, given the peculiar circumstances of this case, namely the impugned decision this is nevertheless not a decision of an identifiable public authority, I entertain doubt whether the procedure used by the subject is the right procedure to settle the dispute in question.

It is noteworthy to note that the orders sought are also discretionary and the court before exercising such discretion in favour of the subject must be satisfied that the subject has exhausted or followed the available legal procedures laid down by statute. If the court were to exercise such discretion at this point in time it would be tantamount to judicial interference with the affairs of the concerned political parties.

There is a wealth of decisions where the courts have been reluctant to invoke jurisdiction to assist a litigant who has chosen not to exhaust other available statutory procedures for the redress of grievances. I am guided by the Court of Appeal decision of **The Speaker of the National Assembly V. The Hon. James Njenga Karume, Civil Application No. 92 of 1992 (Unreported)**. See also my decision in the case of **Orie Rogo Manduli V. Catherine Mukite Nobwola & 3 others**, [2013] eKLR.

The **Constitution of Kenya 2010** at **Article 159(2)(1)** provides for alternate dispute resolution. From the facts of the case, this court is of the view that the subject herein can seek recourse and resolution of the dispute in a proper forum as provided for under the **Political Parties Act No 11 of 2011**.

### **FINDINGS AND DETERMINATION**

For the reasons set out above;

This court finds that the Preliminary Objection qualifies and meets the threshold of a Preliminary Objection.

This court finds that the dispute is as between a member of a political party and a political party and that the dispute falls within the jurisdiction of the Political Parties Act.

This court finds that its jurisdiction to hear and determine the application is not ousted but restricted as the application is found to be premature.

The Preliminary Objection is nevertheless hereby upheld.

The application is hereby struck out in its entirety.

Each party shall bear his/their own costs.

Orders accordingly.

**Dated, Signed and Delivered at Nakuru this 27th day of November, 2014.**

**A. MSHILA**

**JUDGE**